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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Subject Index

	Page
Opinion below	1
Statutes involved	2
Questions presented	2
Statement of the case	3
Reasons for denying the writ	11
I. Petitioners' serious misstatement of the case, standing alone, warrants denial of a writ of certiorari	11
II. Both courts below correctly applied this court's rulings in rejecting petitioners' claims to antitrust immunity	13
A. Petitioners' conduct is beyond the scope of §5(12) of the Interstate Commerce Act	15
B. Petitioners' conduct is not entitled to implied immunity	17
III. Both courts below correctly ruled there was no prejudicial error with respect to admission of consent decrees	21
IV. Both courts below correctly ruled with respect to petitioners' fraudulent concealment	23
V. Both courts below correctly held the statute of limitations was tolled by the ICC proceedings to enjoin petitioners' destructive practices	26
Conclusion	34

Table of Authorities Cited

Cases

Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230 (6th Cir. 1974) 24
Albrecht v. The Herald Co., 390 U.S. 140 (1968) 12
Allis Chalmers Mfg. Co. v. Commonwealth Edison Co., 315 F.2d 558 (7th Cir. 1963) 24
American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 24, 32, 33
Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2d Cir. 1962), cert. denied, 373 U.S. 909 (1963) .. 24

Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) 32, 33

California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972) 13
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 14, 16, 20, 33
Comstock v. Group of Institutional Investors, 335 U.S. 211 (1947) 26
Control Data Corp. v. IBM Corp., 421 F.2d 323 (8th Cir. 1970) 21
Crummer Company v. DuPont, 255 F.2d 425 (5th Cir. 1958) cert. denied, 358 U.S. 884 (1959) 13

Denver & R.G.W.R. Co. v. United States, 387 U.S. 485 (1967) 30

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951) 22

Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726 ..... 14, 16
Friedman v. Meyers, 482 F.2d 435 (2d Cir. 1973) 25

General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964) 24
Georgia v. Pennsylvania R. Co., 320 U.S. 439 13
Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962) 13
Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 15, 17
Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972) 21
Greyhound Computer Corp. v. IBM Corp., 1977 CCH Trade Cases, ¶61,603 (9th Cir. 1977) 21

Pages

Greyhound Corp. v. United States, 370 F.Supp. 881 (N.D. Ill. 1974) 3, 10
Greyhound Lines, Inc. v. United States, 301 F.Supp. 356 (N.D. Ill. 1969) 3
Greyhound Lines, Inc. v. United States, 308 F.Supp. 1033 (N.D. Ill. 1970) 3
Gulf State Utilities Co. v. FPC, 411 U.S. 747, 36 L.Ed.2d 635 (1973) 30

Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir.), cert. denied, 389 U.S. 912 (1967) 28
Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1943) 25
Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1963) 19, 20
Hirabayashi v. United States, 320 U.S. 81 (1943) 13
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 24
Household Goods Carriers Bureau v. Terell, 452 F.2d 152 (5th Cir. 1971) 23
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 13, 14

International Ladies Garment Workers v. NLRB, 463 F.2d 907 (D.C. Cir. 1973) 25
Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972) 13

Jones v. State Board of Education, 397 U.S. 31 (1970) 13

Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962), cert. denied, 373 U.S. 914 (1963) 24, 28
Klors, Inc. v. Broadway-Hales Stores, Inc., 359 U.S. 207 (1959) 12
Leh v. General Petroleum Corp., 382 U.S. 54 (1965) 27, 33
Luria Steel & Trading Corp. v. Ogden Corp., 484 F.2d 1016 (3d Cir.), cert. denied, 414 U.S. 1158 (1974) 28, 29

McLean Trucking Co. v. United States, 321 U.S. 67 (1944) 30
Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) 27, 28, 30, 33
Mt. Hood Stages, Inc., Petition for Modification - Greyhound Mergers (Western Mergers), 104 MCC 449 (1968) 3, 16, 25, 29

Pages

Mt. Hood Stages, Inc. v. The Greyhound Corp., 555 F.2d 687 (9th Cir. 1977) 3, 9, 19, 21, 25, 26, 28, 29, 30, 31, 33
Mt. Hood Stages, Inc. v. The Greyhound Corp., 1973-2 CCH Trade Cases ¶74,824 (D. Ore. 1973) 3

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 32, 34
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 15

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 13, 15, 17, 20
Public Service Co. of New Mexico v. General Electric Co., 312 F.2d 306 (10th Cir. 1963), cert. denied, 374 U.S. 809 (1963) 24

Rader v. Balfour, 440 F.2d 469 (7th Cir.), cert. denied, 404 U.S. 983 (1971) 28, 29
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) 15, 33

United Mine Workers v. Pennington, 381 U.S. 657, n. 3 (1965) 22, 23
United States v. Borden Company, 308 U.S. 198 15
United States v. General Motors Corp., 384 U.S. 127 (1966) 12
United States v. McKesson & Robbins, 351 U.S. 305 (1956) 15, 16
United States v. Pacific Greyhound Lines, et al., 1947 CCH Trade Cases ¶57,619 (N.D. Cal. 1947) 5
United States v. The Greyhound Corporation, 363 F.Supp. 525 (N.D. Ill. 1973) 3
United States v. The Greyhound Corp., 508 F.2d 529 (7th Cir. 1974) 3
United States v. Interstate Commerce Commission, 396 U.S. 491 (1970) 30
United States v. McKesson & Robbins, 351 U.S. 305 (1956) 12
United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975) 14, 15, 16, 17, 18, 20
United States v. Western P.R. Co., 352 U.S. 54 (1956) ... 34

Vitagraph, Inc. v. Perelman, 95 F.2d 142 (3d Cir. 1938), cert. denied, 305 U.S. 610 (1938) 22

Pages

Weinberger v. Retail Credit Co., 498 F.2d 552 (4th Cir. 1974) 24
Westinghouse Electric Corp. v. City of Burlington, Vermont, 326 F.2d 691 (D.C. Cir. 1964) 24
Westinghouse v. Pac. Gas & Elec. Co., 326 F.2d 575 (9th Cir. 1964) 24, 31
Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) 13

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 27, 30, 33

Statutes

Clayton Act:
Section 4 (15 U.S.C. Section 15) 19
Section 5a (15 U.S.C. Section 16(a)) 21, 22
Section 5(i) (15 U.S.C. Section 16(i) ..3, 27, 28, 29, 30, 31, 32
Section 16 (15 U.S.C. Section 26) 19, 30

Interstate Commerce Act, Section 5(12) (49 U.S.C. Section 5(12)) 15, 16

Investment Act, 1940 (15 U.S.C. Section 80a-22(f)) 18

Sherman Act:
Section 1 (15 U.S.C. Section 1) 2, 4, 10, 12, 13
Section 2 (15 U.S.C. Section 2) 2, 4, 10, 12

54 Stat. 899, 49 U.S.C. preceding Section 1 18

Texts

Wright & Miller, Federal Practice & Procedure, Volume 7a, Section 1914 27

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (App. A to Petition), affirming the decision of the District Court (App. C to Petition), is officially reported at 555 F.2d 687.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) are set forth in Appendix B hereto.

QUESTIONS PRESENTED

Based upon the evidence adduced at trial, the verdict of the jury and the rulings of the trial court and of the Court of Appeals, Mt. Hood believes this case presents the following questions:

1. Whether the destructive competitive practices shown by the record below were "necessary" "to hold, maintain and operate" carriers previously acquired by petitioners with the approval of the Interstate Commerce Commission ("ICC").

2. Whether the existence of ICC jurisdiction over the destructive competitive practices of petitioners is sufficient to preempt the application of the treble damage provisions of the Clayton Act to practices specifically disapproved by the ICC as "contrary to the national transportation policy".

3. Whether the trial court abused its discretion in admitting evidence of consent decrees which were relevant to the issues in the case with appropriate limiting instructions.

4. Whether this Court should again review the evidence concerning the issue of fraudulent concealment after the verdict of the jury on that issue was sustained by the trial court and the Court of Appeals.

5. Whether the courts below properly concluded the statute of limitations was tolled under Section 5(i) of the Clayton Act (15 U.S.C. Section 16(i)) by reason of the Justice Department's intervention as a party in a pending ICC proceeding to prevent destructive practices in violation of both the National Transportation Policy and the antitrust laws.

6. Whether the statute of limitations was tolled by Mt. Hood's prompt resort to the ICC for rulings critical to the resolution of its antitrust claims.

STATEMENT OF THE CASE

The decision of the court below is the latest word in fourteen years of litigation before the Interstate Commerce Commission ("ICC") and the United States Courts. During that history, petitioners' conduct has been analyzed and condemned on ten separate occasions by five different tribunals: United States District Courts in Illinois and Oregon, the Courts of Appeals for the Seventh and Ninth Circuits and the ICC.[1] That conduct has been

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[1] *Mt. Hood Stages, Inc., Petition for Modification - Greyhound Mergers* (Western Mergers), 104 MCC 449, 464 (1938); Exhs. 426, 430; *Greyhound Lines, Inc. v. United States,* 301 F.Supp. 356 (N.D. Ill. 1969); *Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1033 (N.D. Ill. 1970); *United States v. The Greyhound Corporation,* 363 F.Supp. 525 (N.D. Ill. 1973); *The Greyhound Corp. v. United States,* 370 F.Supp. 881 (N.D. Ill. 1974); *United States v. The Greyhound Corp.,* 508 F.2d 529 (7th Cir. 1974); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 1973-2 CCH Trade Cases, ¶74,824 (D. Ore. 1973); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 555 F.2d 687 (9th Cir. 1977).

adjudged (1) predatory, (2) collusive, (3) fraudulent, (4) injurious to the public interest, (5) contrary to the national transportation policy, and (6) wilfully contemptuous of ICC and District Court orders. Petitioners were held to have violated both the Interstate Commerce Act and the Sherman Act. They have been convicted of criminal and civil contempt, fined $600,000 and placed on five years probation. They were proven to have intended to destroy Mt. Hood and to have almost achieved that goal. They were shown to have caused massive damages to Mt. Hood for which the Interstate Commerce Act provides no remedy.

Nonetheless, petitioners contend they should be exonerated from antitrust liability because they operate in an industry subject to "pervasive regulation"; that they should be liberated from the consequences of their actions and Mt. Hood denied restitution for its proven injury to avoid hypothetical conflicts between antitrust and regulatory schemes. They must focus upon imagined conflicts, for the conduct involved in this case has been condemned under both frameworks. Petitioners are also forced to seriously misstate the rulings of the courts below, and to conceal the special verdict of the jury that they also violated Section 1 of the Sherman Act (15 U.S.C. §1) in order to conjure up points of law ostensibly deserving of this Court's attention. As a result, the case presented by their petition bears little resemblance to the facts and the legal issues actually dealt with by the courts below.

The parties. Mt. Hood is a "bridge carrier" of passengers and express moving between various cities located

in Oregon, Idaho and Utah (Tr. 3410).[2] Because its bridge routes are from 25% to 40% shorter than Greyhound routes, Mt. Hood has been able to provide several hours faster service than Greyhound to passengers moving between those cities (Exh. 471-A; Exh. R-7).

Greyhound Lines, Inc. operates routes and ticket sales agencies throughout the United States (Exhs. 476-8; 445). It is a wholly-owned subsidiary of the Greyhound Corporation (Exh. 473), and it controls over 80% of all intercity bus traffic in the 11 western states (Exh. 428-A). For the past 25 years, Mt. Hood has been encircled by petitioners' route structure and dependent upon them for whatever bridge traffic they chose to route over Mt. Hood's lines (Exhs. 414, 419, 425, 433, 445; Tr. 1338, 1795).

The period 1947-1960. In 1947, a consent decree was entered in *United States v. Pacific Greyhound Lines, et al.*, 1947 CCH Trade Cases ¶57,619 (N.D. Cal. 1947), requiring petitioners to discontinue various restrictive traffic agreements which they had obtained from other carriers in the western United States. Petitioners therefore embarked upon a program of acquiring all independent bus companies in the Northwest—including those carriers subject to the earlier contractual restraints. Concerned that once it became encircled petitioners might proceed to "longhaul" passengers so as to deprive Mt. Hood of the

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[2] A bridge carrier "is a carrier that lies between two territories and carries the traffic from one connecting carrier to another connecting carrier" (Tr. 2772). Mt. Hood's bridge routes are between Portland, Eugene and Albany, Oregon, on the west and Salt Lake City, Utah on the east and between The Dalles and Biggs, Oregon, on the north and Klamath Falls, Oregon, on the south (Exh. 471-A).

bridge traffic it needed to survive (Tr. 3410),[3] Mt. Hood protested the acquisitions.

To defeat Mt. Hood's protests and secure ICC approval of their acquisition program, petitioners' top officials repeatedly stated under oath that Greyhound would do nothing to discourage Mt. Hood's routes from being available to the public; that "it is not the policy of [Greyhound] to route passengers over a circuitous route over its line"; that "there is no endeavor by Greyhound to route passengers" against their preference for Mt. Hood's shorter bridge routes; that Greyhound would disclose alternative services to the passenger so as "to give the passenger his choice"; that Greyhound's "long established and jointly developed routes" with Mt. Hood "will continue"; that Greyhound policy is to require ticket agents to quote both routes so that the passenger can "make his choice of the route"; that Mt. Hood's schedules are shown in Greyhound's time folders, and Mt. Hood's routes are shown on Greyhound's maps and that both will continue; that joint through bus service with Mt. Hood "will be maintained"; that there would be no discrimination against Mt. Hood; and that the ICC and Mt. Hood can both take petitioners' assurances "as a commitment" (Exhs. 36, 45, 49, 66, 121).[4]

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[3]To "longhaul" a passenger is to divert him over a more circuitous route, generally by withholding information or giving inaccurate information about a more direct route.

[4]Defendants' sworn representations during the acquisition program were so numerous that it is not possible to do them justice here. They are described more fully in the "Summary of Exhibits Relating to Predatory and Collusive Practices which were Fraudulently Concealed by Defendants" (R. 2443, *et seq.*) and in Appendix A to Mt. Hood's brief to the Ninth Circuit.

Greyhound's representations were relied upon by both the ICC and Mt. Hood (555 F.2d at 689; Tr. 3495-96, 3509-10, 3514), but the evidence at trial showed they were knowingly false when made. While issuing disclaimers to the ICC and Mt. Hood, petitioners had already begun plans to destroy Mt. Hood's bridge routes by predatory means. Greyhound recognized that Mt. Hood's bridge service gave passengers "a saving of up to 4 hours and 10 minutes in travel time" compared to petitioners' longer routes (Exh. 130). To make the joint through bus service "much less desirable to the public" (Exh. 131) petitioners at first planned to break schedule connections with Mt. Hood. Fearing discovery, however, petitioners elected instead to issue confidential directives that all passengers were to be longhauled around Mt. Hood's direct routes and over petitioners' circuitous routes (Exh. 131).

Petitioners did all they could to hide their longhauling activities from the ICC, Mt. Hood and the bus traveling public. Thus petitioners' management cautioned "we should be careful not to put anything in writing demanding that they [passengers] be exclusively routed over [Greyhound]" (Exh. 54); that Mt. Hood's request to independent agents that passengers be informed of its bridge routes must be countermanded but "I [Greyhound's president] don't want these instructions put in writing" (Exh. 103); that petitioners had succeeded in keeping Mt. Hood routing "at a minimum" (Exh. 94); that Greyhound officials should have "a quiet talk" with independent ticket agents concerning passengers still traveling over Mt. Hood's bridge routes (Exh. 123) but "it has to be handled carefully" as "I [Greyhound's president] prefer that it

not get into [Mt. Hood's] hands" so "I do not want any bulletins issued" (Exh. 131).

Thus while it was to be handled "aggressively" (Exh. 131),[5] Greyhound's management stressed over and over that it was also to be handled "verbally" and "confidentially" and "quietly" and that no written traces of their collusion with ticket agents were to be left for discovery by outsiders (Exhs. 124, 125, 137, 138, 150). These secret directives continued unabated through the 1950s.[6]

The period 1961-1973. Whereas their conduct during and immediately after the acquisition program (1947-1960) was covert, petitioners thereafter substantially broadened the spectrum of their destructive acts toward Mt. Hood. In early 1961, petitioners eliminated Mt. Hood's connecting service and most of Mt. Hood's local service from Greyhound time folders (Tr. 3660-75, 3861-2; Exhs. 303, 306, 384-A). As soon as Greyhound learned that Mt. Hood was seeking to develop connections with two other carriers in late 1961, Greyhound obtained rights of first refusal from them (Tr. 3694-95; Exhs. 313, 314, 315). Greyhound's president later claimed that Mt. Hood's efforts to obtain alternate bridge routes, necessitated by Greyhound's longhauling practices, had been successfully "blocked" (Exh. 315).

In 1963, petitioners' top officials intensified their plan to destroy Mt. Hood's north-south bridge route (Exhs.

[5]As to the bus passengers' preference for Mt. Hood's faster and more direct service, Greyhound's president was unmoved: "There is no use in telling me that those people demanded that they be routed over Pacific Trailways." (Exhs. 146, 149).

[6]*See* footnote 4, *supra.*

353, 356). First, they explored various methods of arbitrarily increasing Mt. Hood's costs of operations (Exhs. 345-47). Later, petitioners furnished Mt. Hood's financial statements to union officials and persuaded them to increase their wage demands against Mt. Hood during labor negotiations scheduled for May 1964 (Tr. 944-45; Exhs. 304, 308, 311, 352). Petitioners' collaboration with the union officials made a strike against Mt. Hood inevitable.

When the union struck Mt. Hood in May 1964, petitioners terminated the joint through bus and broke other schedule connections with Mt. Hood.[7] Petitioners' president assured management this stratagem would enable them to claim the joint through bus service was "broken for reasons beyond our control" (Exh. 357). Mt. Hood's bridge traffic dropped from about 25,000 passengers in 1963 to about 900 in 1968. It has never returned to its pre-1964 level (Exh. 476, App. 1).

On October 7, 1964, after petitioners refused Mt. Hood's plea to restore connections (Exh. 360), Mt. Hood filed its petition for relief with the ICC (R. 1402). On December 14, 1964, the Justice Department (Antitrust Division) petitioned to intervene for the purpose of enforcing the antitrust laws (R. 2266-73) and thereafter actively participated with Mt. Hood in all phases of that action directed at preventing Greyhound's destructive competition (R. 2266, 2418, 2426). Following a trial, the ICC (Division 3) found that Greyhound's practices were "not con-

[7]It was the joint through bus service which the Court of Appeals declared "provided better service to travelers and was profitable for both companies" (555 F.2d at p. 689) and which petitioners had assured the ICC under oath "will be maintained" (*Id.*).

sistent with the public interest," were "inconsistent with their representations made in various Section 5 proceedings" and "were inspired by a desire to stifle competition" and "injure or destroy" Mt. Hood (104 MCC at 459-63).

Petitioners then filed an action in the United States District Court in Chicago to set aside the ICC orders, and the Justice Department counterclaimed for specific enforcement thereof. A three-judge court affirmed the ICC orders and granted the injunction sought by the Government requiring defendants to discontinue their destructive practices against Mt. Hood (308 F.Supp. at 1039-40).

Petitioners still refused. Consequently on June 27, 1973, the District Court in Chicago found petitioners guilty of criminal and civil contempt for wilfully violating the three-judge court's injunction of February 5, 1970 (363 F.Supp. 525). Just two months before, on May 2, 1973, the Oregon jury in the trial court below found defendants' same conduct violated both §§ 1 and 2 of the Sherman Act (Appendix A hereto). The trial judge denied Greyhound's post-trial motions. Petitioners appealed both the Oregon and Illinois federal court judgments. Both the Seventh and Ninth Circuits unanimously affirmed the judgments below.[8]

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[8]*See* footnote 1, *supra*. As to the effect of Greyhound's predatory conduct, the District Court in Chicago declared:

> "Two direct consequences flowed from Greyhound's contempt; first, Greyhound's only competitor in the Pacific Northwest was threatened with destruction and, second, the evidence reveals that efficient bus service in the Pacific Northwest was disrupted by Greyhound's conduct. There is no doubt that large numbers of bus travelers were inconvenienced by Greyhound's contempt." (370 F.Supp. at 884)

Shortly after Mt. Hood filed its petition with the ICC for injunctive relief in 1964, Greyhound warned Mt. Hood to withdraw its petition or Greyhound "is going to keep you in Court for ten years and break you" (Tr. 3732). That was 13 years ago. In rejecting Greyhound's request to stay the ICC's cease and desist order in 1969, Judge Robson of the Northern District of Illinois declared: "It is this Court's opinion that the delay should end here" (301 F.Supp. at 360). That was 8 years ago. In denying all of Greyhound's post-trial motions, the trial judge below declared: "The litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct" (1973-2 CCH Trade Cases, par. 74,924, p. 95,669). That was 4 years ago. In carrying out this program of delay, petitioners have surpassed their own expectations.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' SERIOUS MISSTATEMENT OF THE CASE, STANDING ALONE, WARRANTS DENIAL OF A WRIT OF CERTIORARI

Petitioners have grossly misstated the record below in order to obtain review by this Court. Petitioners tell the Court "This is a monopolization case," it "was tried as an unfettered monopolization case" and it was "based on" acquisitions which the ICC approved (Petition at 7, 20). It is an incredible distortion for Greyhound to tell the Court that the opinions below and Mt. Hood's claim are essentially based on the approved acquisitions. The trial court expressly instructed the jury that a verdict

could not rest on the approved acquisitions and that only the wrongful exercise of market power would support a finding of liability: "The existence of monopoly power is not, in a regulated industry, evidence of a violation of §2 of the Sherman Act because the Interstate Commerce Act exempts regulated carriers from liability arising from mere possession of monopoly power" (Tr. 6753); therefore, "the violation, if any, arises from the improper use of monopoly power" (Tr. 6753).

Nowhere do petitioners acknowledge the application of §1 of the Sherman Act. Yet the jury specifically found that petitioners violated Section 1 and awarded damages for that violation (Appendix A). That finding was supported by substantial evidence and proper instructions, and is not contested here. Indeed, the Court of Appeals observed "Greyhound does not deny the sufficiency of the evidence to establish a violation of §§1 and 2 of the Sherman Act" (Petition Appendix A at 2). That evidence showed that petitioners combined and conspired (1) with numerous independent commission agents,[9] (2) with several other carriers, (3) with union officials, (4) with an ICC official, (5) with an air carrier, and with various others—all for the purpose of destroying Mt. Hood.

[9]Greyhound admits those commission agents were independent businessmen whom it had no right to control (Tr. 267-68, 370, 1496-97, 1498, 1743, 5676). Hence the Sherman Act prohibited Greyhound from conspiring with them, *Albrecht v. The Herald Co.*, 390 U.S. 140 (1968); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klors, Inc. v. Broadway-Hales Stores, Inc.*, 359 U.S. 207 (1959). (See R. 2528-33). This combination was horizontal as well as vertical because Greyhound operated at the same functional level as its independent commission agents. *United States v. McKesson & Robbins*, 351 U.S. 305, 312-13 (1956).

The jury's special verdict under §1 and its affirmance by the Court of Appeals vitiate petitioners' claims regarding both immunity[10] and fraudulent concealment.[11] That §1 finding provides an independent basis for the judgment below which required affirmance by the Court of Appeals and warrants this Court's denial of certiorari without more. *Cf. Goldlawr, Inc. v. Heiman*, 369 U.S. 463, at 465 n.5 (1962); *Jones v. State Board of Education*, 397 U.S. 31 (1970); *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943).

II. BOTH COURTS BELOW CORRECTLY APPLIED THIS COURT'S RULINGS IN REJECTING PETITIONERS' CLAIMS TO ANTITRUST IMMUNITY

To avoid liability for the profound injury caused by their actions, petitioners ask this Court to rule that the mere existence of regulation precludes application of the antitrust laws to members of the regulated industry. Greyhound's contention that "the problem is the conflict

[10]It has been consistently held that antitrust immunity cannot be given to a combination and conspiracy to destroy a competitor, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 387 (1973); *Georgia v. Pennsylvania R. Co.*, 320 U.S. 439, 455-57; *Pan American Airways v. United States*, 371 U.S. 296, 306 (1963), particularly if the conspiracy was also a fraud upon the regulatory agency as well as upon the victim, *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972); *Woods Exploration & Pro. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). As held in *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972), "No action which impairs the fair and impartial functioning of an administrative agency should be allowed to hide behind the cloak of an antitrust exemption."

[11]*Cf. Crummer Company v. DuPont*, 255 F.2d 425, 430 (5th Cir. 1958), *cert. denied*, 358 U.S. 884 (1959), wherein fraudulent concealment was upheld despite knowledge of some acts because plaintiffs "were unable to learn of the connection between them that was essential to the existence of a conspiracy."

between competing jurisdictions" (Petition at 17) presumes both conflict and competition between the courts and the regulatory agency. Under this argument, concurrent jurisdiction automatically creates an irreconcilable conflict and ousts the courts of antitrust jurisdiction.

This Court has never held that immunity exists from antitrust damages merely because both regimes have jurisdiction over the same conduct. Nor has it held that a "pervasive" regulatory system is, as a matter of law, at irreconcilable odds with an antitrust damage award. The Court has consistently acted to accommodate the two schemes and their respective remedies in the belief that absent contrary Congressional intent, antitrust remedies apply. In determining the question of irreconcilable conflict, in each case this Court has conducted a thorough analysis of the conduct involved and the effect of the remedy sought before it is willing to find a plain repugnance between antitrust and regulatory systems. In each case, the Court has required a conflict which makes the regulatory system unworkable before immunity is found.

Blanket preemption has been rejected in favor of (a) express exemptions for particular transactions approved by the regulatory agency pursuant to express legislative mandate, *e.g., Hughes Tool Company v. Trans World Airlines,* 409 U.S. 363 (1973); *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726 (1973); *Carnation Company v. Pacific Westbound Conference,* 383 U.S. 213, 219 (1966) or (b) implied immunity in "particular and discrete instances" [*United States v. National Ass'n of Securities Dealers,* 422 U.S. 694, 734 (1975)] where there is a "clear repugnance" between the antitrust

and regulatory standards and remedies such that relief from antitrust sanctions is necessary to make the regulatory system work. *See, e.g., Gordon v. New York Stock Exchange,* 422 U.S. 659, 691 (1975); *United States v. National Ass'n of Securities Dealers, supra,* 422 U.S. at 734; *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 309 (1963). Neither of these limited exceptions to the "fundamental national policies embodied in the antitrust laws" [*Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973)] applies to Greyhound's anticompetitive conduct.

A. Petitioners' Conduct Is Beyond the Scope of §5(12) of the Interstate Commerce Act

Petitioners claim exemption by virtue of §5(12) of the Interstate Commerce Act (49 U.S.C. §5(12) which expressly exempts transactions, including acquisitions, approved by the ICC from antitrust liability. The scope of that exemption is limited, however, to conduct which is "necessary" to implement the approved transaction in accordance with the terms and conditions imposed by the ICC and to thereafter hold, maintain and operate any properties or exercise any control acquired. Petitioners interpret this proviso to immunize every conceivable use of the acquired properties, no matter how collusive or predatory, because such behavior is "necessary" to petitioners' operations.

Such an expansive construction of express exemptions has been consistently disapproved by the Court. *E.g., United States v. Borden Company,* 308 U.S. 188, at 198 (1939); *United States v. McKesson & Robbins,* 351 U.S.

305, 316 (1956); *Carnation Company v. Pacific Westbound Conference, supra,* 383 U.S. at 217; *Federal Maritime Commission v. Seatrain Lines, supra,* 411 U.S. at 732-733; *United States v. National Ass'n of Securities Dealers, supra,* 422 U.S. at 720. By providing a statutory exemption, Congress has declared the limits of immunity which it intended. Those limits are to be strictly construed. *Federal Maritime Commission v. Seatrain Lines, supra,* 411 U.S. at 732-33.

Petitioners cannot seriously claim their conduct was "necessary" to carry the approved transaction into effect since "the Commission approved the acquisition in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur . . ." (Petition Appendix A, at p. 7). But if there could be any doubt as to whether such conduct was "necessary" for §5(12) purposes, that doubt must surely vanish in the light of ICC condemnation of petitioners' conduct as "destructive competition in contravention of the national transportation policy . . ." *Mt. Hood Stages, Inc.,* 104 MCC 449, 463 (1968). It was petitioners' disapproved behavior, not the approved acquisitions, which resulted in liability for antitrust damages. Those acquisitions remain immune from antitrust sanctions and only by dissembling the record below can petitioners argue their acquisitions formed the gravamen of Mt. Hood's antitrust claims. In construing the impact of §5(12) of the Interstate Commerce Act upon this case, the courts below were faithful to this Court's many decisions on express exemption. Further review by this Court is thus plainly unwarranted.

B. Petitioners' Conduct Is Not Entitled to Implied Immunity

Petitioners' arguments concerning immunity by implication are equally without merit. In each case where this Court has found an implied repeal of the Sherman Act it has held that result to be necessary to make the regulatory system work. *Gordon v. New York Stock Exchange, supra,* 422 U.S. at 691; *United States v. National Ass'n of Securities Dealers, supra,* 422 U.S. at 730, 735; *Pan American World Airways v. United States, supra,* 371 U.S. at 309-310. Thus, in *Gordon* the Court declared that

> "Only where there is a 'plain repugnancy between the antitrust laws and regulatory provisions' will repeal be implied" (422 U.S. at 682) and "only if necessary . . . and even then only to the minimum extent necessary" (422 U.S. at 683).

In each case where implied repeal has been sustained the necessity therefor resulted from potential conflict with either prior agency approval of the challenged conduct or with the agency's power to regulate the conduct prospectively. Thus in *Gordon v. New York Stock Exchange, supra,* the Court held the fixed commission rates immune because they had been "subjected to the scrutiny and approval of the SEC" and that the "degree of scrutiny and approval by the SEC is not significantly different for our purposes here than an affirmative order to the exchanges to follow fixed rates" (422 U.S. at 689 and n.13). Similarly, the vertical restraints on secondary marketing activities in *United States v. National Ass'n of Securities Dealers, supra,* were deemed to have been approved by the SEC through inaction as contemplated

by section 22(f) of the Investment Act of 1940 (15 U.S.C. §80a-22(f)) (422 U.S. at 726). The alleged horizontal restraints were immune because the challenged conduct was ". . . designed to encourage the suppression of intra-fund secondary market activities, precisely the restriction that the SEC consistently has approved pursuant to §22(f) for nearly 35 years." (422 U.S. at 733). Furthermore, in each of these cases, this Court determined Congressional intent and found the challenged practices clearly within the contemplation of Congress when the regulatory system was created.

No reported case has ever held implied immunity necessary to protect conduct which was not only not approved, but was actually condemned by the agency and in direct conflict with express commitments made to that agency by the antitrust defendant. Nor can it be argued that Congress intended to immunize Greyhound's conduct when the national transportation policy expressly prohibits "destructive competitive practices." (national transportation policy, 54 Stat. 899, 49 U.S.C. preceding §1; Appendix B hereto.)

Asserting a belated concern for the regulatory system which they contemptuously subverted for years, petitioners argue that application of the antitrust laws might conflict with the ICC's efforts to regulate petitioners' conduct. The deficiencies inherent in that abstraction when applied to this particular case were detailed by the court below when it held in accordance with this Court's well established standards:

> "No 'plain repugnancy' exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints 'to make the [Interstate Commerce Act] work.' . . . Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. . . .
>
> "The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. . . . Trebling the damages—an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust proceeding. Since the transactions involved offended the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply." (555 F.2d at 692)

Thus as the court below correctly observed, "the remedies . . . have also meshed," thereby further preventing conflict. The court below had no authority to enter an injunction against petitioners' conduct by the express terms of section 16 of the Clayton Act (15 U.S.C. §26),[12] while the ICC has no authority to award damages to a competitor injured by a regulated carriers' anti-competitive behavior. *Cf. Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1963). The ICC had enjoined petitioners' routing practices as unreasonable in *Hewitt-Robbins*, just as it enjoined petitioners' routing

[12]It is noteworthy that there is no comparable prohibition in section 4 of the Clayton Act (15 U.S.C. §15) creating a private right to damages arising from violations of the antitrust laws.

practices here. The Court held that ICC regulation of routing practices did not preempt a common law claim for damages, inasmuch as restitution would not hamper administration of the Interstate Commerce Act but on the contrary would accommodate the regulatory scheme.[13]

This distinction between prospective relief and restitution for past acts is a consistent thread running through this Court's implied immunity cases. *Compare, Carnation Company v. Pacific Westbound Conference, supra,* 383 U.S. at 221-222, *with Pan American World Airways, Inc. v. United States, supra,* 371 U.S. 311-312, and *United States v. National Ass'n of Securities Dealers, supra.* Consistent with *Hewitt-Robbins,* the Court in *Pan American* held that "if it were clear that there was a remedy" under the antitrust laws "not available in a §411 proceedings" the antitrust court would have jurisdiction (371 U.S. at 313 n.19).

There was in this case no conflict between the federal courts and the ICC. The damages awarded in the antitrust court will serve as a deterrent to such anti-competitive behavior by petitioners or others, thereby contributing to the ICC's regulatory efforts, *Hewitt-Robbins.* Petitioners have been required to disgorge at least in part the fruits of their wrongdoing, and Mt. Hood has been partially compensated for its virtual destruction. Both competition and the national transportation policy have been furthered. Reconciliation of the antitrust and regulatory regimes has been achieved in accordance with

[13] ". . . the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize 'cease and desist' proceedings before the Commission." (371 U.S. at 88)

the well-defined guidelines time and again announced by this Court.

III. BOTH COURTS BELOW CORRECTLY RULED THERE WAS NO PREJUDICIAL ERROR WITH RESPECT TO ADMISSION OF CONSENT DECREES

The trial court admitted petitioners' 1947 and 1957 consent decrees in evidence and instructed the jury as to the limited purposes for which they could be considered. Recognizing the trial court's wide discretion with respect to such matters, the Court of Appeals properly affirmed. A trial court must be accorded reasonable latitude in determining the relevancy of evidence in antitrust cases, including evidence of consent decrees, *Greyhound Computer Corp. v. IBM Corp.,* 1977 CCH Trade Cases, ¶61,603 (9th Cir. 1977); *Gray v. Shell Oil Co.,* 469 F.2d 742, 751 (9th Cir. 1972); *Control Data Corp. v. IBM Corp.,* 421 F.2d 323, 326 (8th Cir. 1970). Given the context in which those consent decrees were admitted and the trial court's carefully limiting instructions with respect thereto, the Court of Appeals was plainly correct in concluding "There was no abuse of discretion here" (555 F.2d at 697).

Petitioners rely upon 15 U.S.C. §16(a), which provides that government antitrust judgments constitute prima facie evidence of a violation of the antitrust laws. In contending that §16(a) does not apply to consent decrees, however, petitioners argue a different case. Mt. Hood did not offer the consent decrees as prima facie evidence under §16(a), and the trial court's instructions plainly forbade such use (Tr. 1407-08, 6744-47). But §16(a) certainly does not preclude admission of consent decrees for

all purposes. This Court declared in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), in limiting the prima facie effect of a judgment under §16(a), "we do not intend to preclude its admission for such other purposes, apart from [§16(a)], as the general law of evidence may permit" (p. 572, n.8). As held in *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938), *cert. denied*, 305 U.S. 610 (1938):

> "The testimony as to the consent decree was not admitted as, or intended to be, prima facie evidence against the defendant in this case, but was simply admitted as fact showing the activity of the defendants to prevent double featuring, and as such the testimony was admissible." (95 F.2d at 146)

Both decrees were plainly relevant here. Evidence that petitioners entered consent decrees with no intention of adhering to them, or with the intention of achieving the same restraints by more devious means, is probative of Greyhound's predatory intent.[14] Even conduct which is constitutionally exempt from the antitrust laws may nonetheless be relevant "to show the 'purpose and character of the transaction under scrutiny'." *United Mine Workers v. Pennington*, 381 U.S. 657,

[14]Immediately after the 1947 decree required petitioners to discontinue their restrictive traffic arrangements with other carriers, petitioners sought ICC approval of their acquisitions of those same carriers by fraudulent denials of their predatory conduct toward Mt. Hood. Immediately following entry of the 1957 consent decree which prohibited petitioners from coercing independent joint agencies to discriminate against other carriers, petitioners instructed certain joint agencies to continue their discriminatory practices against Mt. Hood despite the decree but gave such instructions "verbally" to avoid disclosure. (Exhs. 290, 292).

671, n.3 (1965); *Household Goods Carriers Bureau v. Terell*, 452 F.2d 152, 158 (5th Cir. 1971). The decrees were also relevant to show that Mt. Hood, in the exercise of ordinary diligence, relied upon them and would not have reason to know of petitioners' fraudulent concealment of their violations.[15] The trial court admitted the decrees for those limited purposes and no other (Tr. 6746-47). The Court of Appeals correctly affirmed.

IV. BOTH COURTS BELOW CORRECTLY RULED WITH RESPECT TO PETITIONERS' FRAUDULENT CONCEALMENT

The jury specifically found on substantial evidence that Mt. Hood did not have knowledge or notice of petitioners' antitrust violations until December 14, 1960 (App. A). Both the trial court and the Court of Appeals thoroughly reviewed that evidence and both upheld the jury's verdict. Petitioners would now have this Court grant certiorari (a) to consider whether the equitable doctrine of fraudulent concealment applies to antitrust cases and (b) assuming it does, to give the record still another review to determine if the unanimous conclusion of the jury and the District Court and the Court of Appeals was supported by the evidence.

Whether the doctrine of fraudulent concealment applies to antitrust cases is not a question warranting further

[15]Both decrees were promptly communicated to Mt. Hood by petitioners and Mt. Hood justifiably relied upon them as solemn commitments that petitioners would not engage in the conduct recited therein (Tr. 3654). Mt. Hood's president testified: "I felt that this was a court order and they were enjoined from doing these practices" (Tr. 3654).

comment by this Court. The Court declared in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946): "This equitable doctrine is read into every federal statute of limitations". Relying upon *Holmberg*, the Court declared in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974), an antitrust case, that "in cases where the plaintiff has refrained from commencing suit during the period of limitation . . . because of fraudulent concealment [citation], this Court has not hesitated to find the statutory period tolled or suspended by the conduct of defendant." Of the nine circuits that have considered the question, all declared the doctrine of fraudulent concealment applies to antitrust cases.[16]

Nor should this Court have to review the evidence again. The record established to the jury's satisfaction that petitioner's continuous stream of false assurances to the ICC and Mt. Hood, generally under oath and invariably to procure valuable rights from the ICC and forbearance by Mt. Hood, had such a profound cumulative impact as to preclude any reasonably diligent person from possessing knowledge of petitioners' covert practices. Petitioners intended both Mt. Hood and the ICC to rely

[16] *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974); *General Electric Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230 (6th Cir. 1974); *Allis Chalmers Mfg. Co. v. Commonwealth Edison Co.*, 315 F.2d 558 (7th Cir. 1963); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *Westinghouse v. Pac. Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); *Public Service Co. of New Mexico v. General Electric Co.*, 312 F.2d 306 (10th Cir. 1963), *cert. denied*, 374 U.S. 809 (1963); *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 326 F.2d 691 (D.C. Cir. 1964).

upon those assurances as true (555 F.2d at 689) and Mt. Hood did not have knowledge of any facts to indicate they were false (Tr. 3460-3791). The ICC also relied upon petitioners' representations (555 F.2d at 689) and subsequently declared they were a "commitment" not to engage in destructive competitive practices against Mt. Hood and that Mt. Hood "withdrew its opposition in reliance upon such statements" (104 MCC at pp. 462-463).[17]

After petitioners' acquisition program closed in the 1950s, Mt. Hood expressed concern about the failure of a few of petitioners' independent commission agents to quote Mt. Hood service. But petitioners have always maintained they "have no control over the [commission agents'] action and the routing by such commission agents is not a routing by defendants" (Tr. 5676; see also Tr. 267-269; 370; 1496; 3779). Hence Mt. Hood could only suspect that petitioners were lax in their failure to instruct those agents to quote Mt. Hood service (Exh. 197). But laxity is not fraud or collusion and mere suspicion does not constitute knowledge of an antitrust violation. *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973). The court below found that petitioners violated the Sherman Act by collusive and fraudulent behavior aimed at destroying Mt. Hood. Mt. Hood had no knowledge of *that*,

[17] In rejecting petitioners' claim that the ICC had no business relying upon their representations, the District Court in Chicago declared the ICC "had a duty to do so" (308 F.Supp. at 1039). Clearly Mt. Hood was at least equally entitled to rely upon petitioners' sworn representations, *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1943); *International Ladies Garment Workers v. NLRB* 463 F.2d 907, at 922-23 (D.C. Cir. 1973).

and Greyhound's false denials could not give Mt. Hood such knowledge.[18]

When a plaintiff first knew or should have known of a fraudulently concealed antitrust violation is a question of fact for the jury. This jury decided that question against petitioners on substantial evidence, and the trial court upheld that verdict declaring "I am satisfied that there is plenty of evidence to support that verdict on that point." (Tr. 6801) The Court of Appeals reviewed the same voluminous record and unanimously affirmed the trial court. That should be enough. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors,* 335 U.S. 211, 214 (1947).

V. BOTH COURTS BELOW CORRECTLY HELD THE STATUTE OF LIMITATIONS WAS TOLLED BY THE ICC PROCEEDINGS TO ENJOIN PETITIONERS' DESTRUCTIVE PRACTICES

Promptly after petitioners broke connections with Mt. Hood in July 1964, Mt. Hood petitioned the ICC for an order "which will have the effect of prohibiting the discriminatory, and destructive competitive practices herein described" (R. 1407-1408). Just over 60 days later—on

[18]Petitioners contend that once a plaintiff is on notice, he can no longer rely upon a defendant's false denials. But as the Court of Appeals observed, that begs the very question which the jury decided against petitioners on substantial evidence. "In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew nor should have known of Greyhound's antitrust violation" (555 F.2d at 698).

December 14, 1964—the Justice Department (Antitrust Division) intervened in Mt. Hood's support and vigorously prosecuted that action for the next ten years in a continuous effort to stop petitioners from trying to destroy Mt. Hood.

The Court of Appeals upheld the trial court's ruling that the statute of limitations was tolled from December 14, 1964 thereafter, during the pendency of the Government's action to enjoin Greyhound's predatory conduct toward Mt. Hood, by reason of the Clayton Act, 15 U.S.C. §16(i). That decision was plainly correct. It accords with 15 U.S.C. §16(i) and the Congressional policy behind it and is supported by this Court's uniform construction of §16(i) to accommodate private antitrust enforcement policy. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311 (1965); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971); *Leh v. General Petroleum Corp.,* 382 U.S. 54 (1965).

First, the courts below were correct in holding that on December 14, 1964, a "civil proceeding" was "instituted by the United States" within the purview of §16(i).[19] Seizing upon the happenstance that Mt. Hood sought relief just over 60 days before the Justice Department

[19]Defendants contend the Government action was not instituted on the date of its petition for leave to intervene but, at the earliest, on the date said petition was granted. Defendants cite no authority. "In determining whether an intervenor has asserted his claim within the period of the applicable statute of limitations, it has been held that the relevant date is the filing of the motion accompanied by the proposed complaint rather than the day on which the complaint itself is filed after the court has granted the motion." Wright & Miller, *Federal Practice & Procedure,* Vol. 7a, §1914.

did, petitioners claim that a Government action was thus not "instituted." But that is the kind of "grudging interpretation" which this Court, the courts below and several other federal courts have disapproved as contrary to "Congress' basic policy objectives" (555 F.2d at 700).[20] From the date the Government instituted its action 14 years ago until now, it has vigorously prosecuted it for the protection of a small competitor threatened with destruction. When petitioners appealed the ICC's order to the courts eight years ago, it was the Government (not Mt. Hood) that petitioners sued, it was the Government (not Mt. Hood) that counterclaimed for injunctive relief and it was the Government (not Mt. Hood) that later brought contempt proceedings against petitioners for their wilful violations. It would exalt form over substance to say the Government did not "institute" proceedings against petitioners merely because it elected to assert its claim in a pending ICC case.

Both courts below also properly held, on the basis of substantial evidence, that the Government's action was brought "to prevent, restrain or punish violations . . . of the antitrust laws" within the purview of §16(i). In light of the Government's active role in seeking injunctive re-

[20]In holding that "The literal wording of section 16(i) is not controlling" where "one possible interpretation of the language would effect the congressional purpose and another defeat it" (555 F.2d at 699), the court below was in accord with the following Supreme Court and Court of Appeals decisions: *Minnesota Mining, Zenith* and *Leh* [*supra*]; *Luria Steel & Trading Corp. v. Ogden Corp.*, 484 F.2d 1016 (3d Cir.), *cert. denied*, 414 U.S. 1158 (1974); *Rader v. Balfour*, 440 F.2d 469 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971); *Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir.), *cert. denied*, 373 U.S. 914 (1963).

lief for the protection of Mt. Hood against petitioners' destructive practices, petitioners' threshold claim that the Government "took no position" in the ICC case is frivolous. Petitioners further claim that assuming the Government did take a "position", it was not to prevent conduct which violates the antitrust laws.[21] The Court of Appeals properly rejected that claim also, because an agency proceeding not brought "under" the antitrust laws may nonetheless be to "prevent" antitrust violations for §16(i) purposes (555 F.2d at 700). The question is whether the proceeding "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws", *Rader v. Balfour,* 440 F.2d 469, 473 (7th Cir., (1971); *Luria Steel & Trading Corp v. Ogden Corp.*, 484 F.2d 1016, 1020-21 (3d Cir. 1973).

Clearly the ICC action was just that. The court below declared "it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same" (555 F.2d at 691). Petitioners will not dispute this.[22] The Justice Department's petition for leave to intervene plainly declared its purpose was to prevent antitrust violations (R. 2272). The ICC similarly declared it was enjoining conduct which it considered a violation of the antitrust laws (104 MCC at 451-63). The District Court in Chicago, finding that the petitioners engaged in "destructive competition", rec-

[21]In making that claim, petitioners forget they told the court below that "the Justice Department intervened in the [ICC] proceeding to assure the adequate consideration of antitrust issues" (555 F.2d at 701).

[22]They told the court below that "in its petition [before the ICC], plaintiff alleged substantially everything which is alleged in its complaint in this Court" (R. 94).

ognized the ICC's duty to enjoin conduct found to be in violation of the antitrust laws (308 F.Supp. at 1032, 1038). In granting a permanent injunction against petitioners' "destructive practices", the District Court was acting in accordance with numerous Supreme Court decisions which hold the ICC has a duty to consider the antitrust laws.[23] Referring to 15 U.S.C. §26, which allows only the Justice Department to obtain injunctions against antitrust violations by ICC-regulated carriers, the Court in *Denver* stated "this provision underscores the ICC's responsibility to act when such [antitrust] violations are brought to its attention" (387 U.S. at 502).

In holding that §16(i)'s "clearly expressed purpose" is "to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts" (555 F.2d at 699), the court below was faithful to this Court's pronouncements in *Minnesota Mining, Zenith* and *Leh.*[24] Petitioners assert "the only benefit Mt. Hood derived" from the Government action "is the tolling of the statute itself." Although Mt. Hood does not have to prove

[23]*See, e.g., Denver & R.G.W.R. Co. v. United States,* 387 U.S. 485 (1967); *McLean Trucking Co. v. United States,* 321 U.S. 67 (1944); *United States v. Interstate Commerce Commission,* 396 U.S. 491 (1970); *Gulf State Utilities Co. v. FPC,* 411 U.S. 747, (1973).

[24]The Court in *Minnesota Mining* referred to "the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior Government actions" (p. 320). In *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971), this Court held that a broad construction of §16(i) "materially furthers congressional policy by permitting private litigants to await the outcome of Government suits and use the benefits accruing therefrom" (p. 336).

benefits for tolling to apply (555 F.2d at 699 n.31), benefits were conferred by the Government's action which the court below recognized. Important among them were (1) the permanent injunction which the Government obtained for Mt. Hood and (2) the successful resolution of several issues, which the court below recognized as "critical to the defeat of Greyhound's claim of immunity" (555 F.2d at 699). These were benefits no less important to Mt. Hood merely because Mt. Hood assisted the Government in achieving them.

Finally, petitioners' "floodgates" argument must also fail. Both courts below merely held that when a Government action is initiated in a pending ICC case to seek injunctive relief against antitrust violations, §16(i) tolls the statute. Petitioners now ask this Court to decide whether the statute might also be tolled whenever the Justice Department informally "participates" in various other regulatory proceedings "to express its views". But that is not the question which the court below decided or a question which this case presents. Petitioners advert to the spectre of "countless stale antitrust claims" which they speculate might be revived by the lower court's decision, but that spectre pales in the light of Congressional policy which favors private antitrust enforcement and which the Court of Appeals' construction of §16(i) served.[25]

Even if the Government had not begun its action on December 14, 1964, to enjoin petitioners' destructive com-

[25]As declared in *Westinghouse v. Pac. Gas & Elec. Co.,* 326 F.2d 575 (9th Cir. 1964), "Congress was as concerned with the effective enforcement of the Clayton Act as with the banning of stale claims when it enacted Sections 4B and 5(b)" (326 F.2d at 580).

petition so as to invoke §16(i), as it did, the statute of limitations was nonetheless suspended when Mt. Hood filed its petition with the ICC on October 7, 1964. Although the statute of limitations reflects a legislative policy of repose, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), this policy is "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights" *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965). As a result, the federal doctrine of equitable tolling has developed, is well established, and plainly applies here.

Burnett stands for the principle that a federal statute of limitations should be tolled "whenever Congressional purpose is effectuated by tolling the statute of limitations in given circumstances" (380 U.S. at 426-27). In *Burnett*, a state court action was dismissed for improper venue and plaintiff thereafter brought suit in the federal court. This Court held the state action tolled the statute of limitations because plaintiff was diligent, defendant was given adequate notice and tolling would effectuate important federal policies. The Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), followed *Burnett* in holding that an improper class action tolled the statute of limitations as to all purported class members. "The proper test," declared the Court, "is whether tolling the limitation in a given context is consonant with the legislative scheme" (414 U.S. at 557-558).

Policy considerations were obviously important in *Burnett* and *American Pipe*, and two important policies have been served by tolling the statute of limitations here:

(a) that which favors private enforcement of the federal antitrust laws (*Minnesota Mining* [*supra*, 381 U.S. at 317-18]; *Zenith Radio Corp.* [*supra*, 401 U.S. at 336]) and (b) that which favors preliminary resort to the regulatory agency having primary jurisdiction of the matters alleged to obtain rulings that would be of material aid to the federal courts in deciding questions of antitrust immunity, *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

Policy considerations are even stronger here than in *Burnett, American Pipe, Minnesota Mining, Zenith* and *Leh*. In those cases, the statute was tolled for the benefit of plaintiffs who either had committed some procedural error, such as filing in the wrong court (*Burnett*) or filing an improper class action (*American Pipe*), or who were passively awaiting the outcome of related government litigation (*Zenith* and *Leh*). In contrast, Mt. Hood properly and necessarily resorted to the only forum available to it for injunctive relief and for a resolution of important threshold questions so as to enable the federal court to resolve petitioners' claim of immunity without risk of conflict between the regulatory and antitrust schemes. The court below observed this was "critical to the defeat of Greyhound's claim of antitrust immunity" (555 F.2d at 699).

Finally, the statute of limitations' policy has been fully satisfied here. Mt. Hood has neither slumbered on its rights nor surprised petitioners with stale claims. Indeed, petitioners have tenaciously fought Mt. Hood's claims for the past fourteen years. In holding the statute of limi-

tations was tolled during the pendency of related agency proceedings, this Court declared in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, "Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed" (321 U.S. at 349). Mt. Hood acted in accordance with the federal doctrine of primary jurisdiction. Having thus invoked the "remedial scheme developed for enforcement of rights" *United States v. Western P.R. Co.*, 352 U.S. 54, 64 (1956), it should in fairness not be faced with the limitations bar as a result.

CONCLUSION

For the foregoing reasons the Petition herein should be denied and this litigation should end.

November 23, 1977.

Respectfully submitted,

MICHAEL N. KHOURIE,
EUGENE C. CREW,
THOMAS PAINE,
BRUCE MACGREGOR HALL,
Counsel for Respondent.

BROAD, KHOURIE & SCHULZ,
Of Counsel.

(Appendices Follow)

APPENDICES

Appendix A—Special Verdict

United States District Court
District of Oregon

Civil No. 68-374

Mt. Hood Stages, Inc., doing business as Pacific Trailways,
Plaintiff,
vs.
The Greyhound Corporation and Greyhound Lines, Inc.,
Defendants.

[Filed May 2, 1973]

SPECIAL VERDICT

We, the jury, answer the interrogatories as follows:

1. Do you find from the evidence that defendants or either of them violated Section 1 of the Sherman Act?

V
YES ____ NO

2. Do you find from the evidence that defendants or either of them violated Section 2 of the Sherman Act?

V
YES ____ NO

If the answers to Nos. 1 and 2 are *both* "no", you need not answer any further questions.

3. If the answer to Nos. 1 or 2 is "yes", do you find that such violations were fraudulently concealed by defendants, from plaintiff:

(a) during the period January 1, 1953, to December 14, 1960?

YES	NO
V	

(b) during the period December 15, 1960 to July 4, 1964?

YES	NO
V	

4. If the answer to No. 3 (a) or (b) is "yes", please state the date prior to July 5, 1964, which, under the instructions I have given you, you find was the time plaintiff knew or should have known of this violation:

Dec. 14, 1960 (Date)

5. If the answer to Nos. 1 or 2 is "yes", do you find that plaintiff was injured by such violations of the anti-trust laws?

YES	NO
V	

6. If you answer question 5 "yes", then fill in for each of the following periods the amount of damages if any sustained in that period:

July 5, 1964, to March 25, 1973	Amount	$2,650,491
December 15, 1960 to July 5, 1964	Amount	$ 626,482
January 1, 1953, to December 15, 1960	Amount	$1,105,057

Dated this 2nd day of May, 1973.

/s/ Nora Q. Pirrie
Foreman of the Jury

Appendix B—Statutes Involved

Section 1 of the Sherman Act:

§ 1. *Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21, 1974, Pub.L. 93–528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94–145, § 2, 89 Stat. 801.

Section 2 of the Sherman Act:

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21, 1974, Pub.L. 93–528, § 3, 88 Stat. 1708.

The National Transportation Policy:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy."

(Act of September 18, 1940, c. 722, Title I, § 1, 54 Stat. 899; 49 U.S.C. preceding § 1).